Totes Incorporated *and* James A. Stull *and* Letitia Beaumont. Cases 9-CA-14104 and 9-CA-14172

August 11, 1981

DECISION AND ORDER

On April 8, 1981, Administrative Law Judge Robert A. Gritta issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a brief in support thereof.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Totes Incorporated, Loveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT suspend or in any other manner penalize our employees for engaging in protected concerted activities for their mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Letitia Beaumont whole for any loss of earnings, benefits, or seniority suffered by reason of her unlawful suspension, with interest on lost earnings.

TOTES INCORPORATED

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge: This case was heard on March 12, 1980, in Cincinnati, Ohio, based on charges filed by James A. Stull and Letitia Beaumont, individual Charging Parties, on July 17 and August 3, 1979, respectively, and complaints issued by the Regional Director for Region 9 of the National Labor Relations Board on August 30 and September 18, 1979, respectively. An order consolidating cases issued on September 18, 1979.[1]

The complaints alleged that Totes Incorporated (herein called Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to reinstate the Charging Parties following the cessation of a strike in which both were engaged. Stull has not been reinstated; whereas, Beaumont was reinstated after a 6-week suspension. Respondent's timely answer denied the commission of any unfair labor practices.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by General Counsel and Respondent. Both briefs were duly considered.

Upon the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following:

[1] All dates herein are in 1979 unless otherwise specified.

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Totes Incorporated is an Ohio corporation engaged in the manufacture of footwear in Loveland, Ohio. Jurisdiction is not in issue. Respondent, in the past 12 months, in the course and conduct of its business operations shipped products from its Loveland facility, valued in excess of $50,000, directly to points located outside the State of Ohio. I conclude and find that Totes Incorporated is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaints allege, Respondent admits, and I conclude and find that Local 501, International Chemical Workers Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Respondent manufactures rubber footwear and rainwear at its Loveland, Ohio, facility. The Union has represented the production and maintenance employees at Loveland for a period of time. The latest contract between the parties expired on April 27, and certain of Respondent's employees commenced a strike. Respondent continued to operate the plant, and during the strike hired approximately 75 replacement employees. The strike continued until June 17 at which time striking employees made unconditional offers to return to work. Some striking employees were replaced, some were reinstated, and some were denied reinstatement. This case involves two who were denied reinstatement. Respondents stated reason for the denial of reinstatement was that the employees had engaged in strike misconduct. Stull's reinstatement was denied entirely. Beaumont's was delayed for a period of 6 weeks.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Conduct Attributed to Stull*

During the course of the strike, Respondent employed about 75 replacements and an undisclosed number of outside security guards to augment its existing guard force. Although the plant operated only two shifts, between the hours of 7 a.m. and midnight, the picketing was conducted around the clock. Stull picketed at various times and in various locations during the strike. On June 15, he picketed at the plant's main gate, starting about 11 p.m. He remained at the main gate until 12:30 a.m. the following morning, then joined a group of strikers gathered about a fire barrel. The barrel was on property across the public street from the plant. The strikers at the barrel included Jack Hafley, Margaret Lester, David Faulkner, Josephine Vance, and Jack Hayfield.[2]

About 7 a.m., Louis Kohus, one of the temporary security guards, approached the strikers gathered at the fire barrel. Kohus and the group, including Stull, conversed about topics unrelated to the strike.[3] During the conversation, Vance, who was a picket captain, arrived on the scene and suggested to Kohus that since the strikers could not get on Respondent's property, it was unfair for him to be with the strikers, and she asked Kohus to leave. As a result of Vance's request, she and Kohus got in an argument. Vance, Lester, and Stull testified that Kohus said he would take Vance to jail if she did not shut her mouth, and Vance replied that Kohus could not do that. Kohus then stated that he could "provoke" Vance into doing or saying something which would give Kohus cause to arrest her. Hafley was questioned about the Vance-Kohus exchange, but failed to substantiate the testimony of Vance, Lester, or Stull. Hafley testified that Kohus said he would take Vance to jail because she had a "smart mouth," but did not include any threat by Kohus that he would "provoke" Vance into doing something which could bring about her arrest. Hafley was a straightforward witness and impressed me as candid. Stull, Vance, and Lester on the other hand seemed intent on discrediting Kohus with the "provoke" incident more so than testifying to what occurred that night. Kohus' denial of the "provoke" remark coupled with the manner in which he testified convinces me that he and Hafley's version are the more accurate. I, therefore, find that Kohus did not suggest or attempt to provoke Vance.[4]

Betty Westerfelt, another temporary guard, testified that at 5 a.m. she was in an automobile in the parking lot on the south side of Respondent's warehouse when she heard the sound of breaking glass. She got out of the car and saw a man, who had been identified to her as Stull, running from one side of the warehouse to the other. He stopped beneath a window on the south side of the warehouse building and began throwing motions toward the building. She again heard the sound of breaking glass. Westerfelt observed this activity of Stull for several minutes and then went to the guard shack also on the other side of the warehouse. At the guard shack, she informed Guard Supervisor Betty Rajewski that Stull was throwing rocks at the warehouse. She further testified that the man she saw had a full beard and a "floppy hat" and was easily seen in the floodlights around the warehouse.[5]

Kohus stated that about 5:30 a.m., while sitting in an automobile on Respondent's property, he heard laughter and commotion coming from the fire barrel. He looked in the direction of the street and saw a man making arm motions as if throwing something toward the warehouse. The man was clearly visible under the building's flood-

[2] Neither Faulkner nor Hayfield testified.

[3] During this conversation Kohus would have seen Stull in his usual garb, the t-shirt, beard, and floppy hat, although there was no introduction by name.

[4] This finding is relevant only for the purpose of assessing credibility to Kohus' account of subsequent events.

[5] Westerfelt's testimony of Stull's identification from Elmer Ertel, the company guard, was received without objection in spite of its obvious hearsay nature. I, however, rely on the descriptive evidence and Stull's admission that he was the only striker present that night who had a full beard and wore a brimmed hat to determine that Stull and the man seen are one and the same.

lights. The man had a full beard and a floppy hat. Kohus did not see or hear glass being broken, but as he watched repetitive motions of the man, his guard supervisor, Rajewski, came out of the building and to his car. She told him she had been standing under a window when rocks and glass showered on top of her. She told him to get out of the car and asked him if he knew who threw the rocks. Kohus told her that he knew. They walked to the gathered strikers at the barrel. Rajewski asked the group, including Stull, Hafley, Vance, and Lester, if they knew who had been throwing rocks. Each denied knowing. Rajewski then went to the guard shack by the warehouse. Kohus said he stayed and talked to the strikers. Kohus confronted the strikers and then told Stull that he was the culprit. Kohus explained his waiting until Rajewski had left to accuse Stull of rock throwing by saying "she had taken control of the situation and whenever there is a senior officer around, I always try to keep my mouth shut."

Rajewski testified, "We [she and Ertel] were in that area, and we were standing there when rocks and glass came through the window which was approximately 22 feet high . . . . The glass and rocks fell around us." (The record shows these windows to be rather large.) Rajewski acknowledged that neither the rocks nor glass actually hit her, and there was no claim that Ertel was hit. Rajewski then lefted the warehouse and yelled to Kohus, who was in the parking lot. She and Kohus went to the fire barrel area. She did not recall asking any questions, only telling Kohus to come on, they are breaking out windows. Rajewski told the strikers at the fire barrel that she was standing under the window when the rocks and glass came flying. She asked, "I don't suppose you know who threw the rocks." She got a negative response and left to call the local sheriff. Kohus lingered at the barrel then joined her in the guard shack where he told her that the rock thrower was the one with the full beard and floppy hat. Rajewski's report includes observations of both Westerfelt and Kohus. Respondent's Exhibit F, in part, states:

> WEST ENTRANCE
>
> Officer Betty Westerfelt saw J. Stull make arm motions as if throwing something at building. Officer Westerfelt heard something hitting building. I immediately went inside with Guard Elmer Ertel to shipping area. While there checking to see if any additional windows had been broken, a rock came through the window, shattering glass all around me. Patrolman Marty Kohus, stationed in the shipping area saw a bearded subject in a hat throw the rocks. Pickets in the West entrance area were: J. Stull, Dave Faulkner, Jack Hafley and Josephine Vance.

Stull testified that Kohus asked Faulkner if he had been throwing rocks, and Faulkner denied it. Kohus then approached Stull and asked, "Wasn't you throwing rock?" When Stull denied it, the two got into a cursing match. Stull testified, "that is when Officer Kohus turned around and pointed his finger at me and told me that if I have to go into court and swear that I seen you throw a rock through the window to get you arrested, he said, I am going to do it." Vance, Lester, and Hafley testified on their recall of the same incident with Kohus. Hafley stated that Kohus asked each employee if they had thrown rocks, and then singled out Stull. "He told Jay Stull that he believed he threw the rock and he told Jay that he thought he was tough." Lester and Vance also acknowledged in their testimony that Kohus accused Stull of throwing a rock, although Lester did equivocate on that point. Stull denied throwing any rocks; and Hafley, Vance, and Lester testified on behalf of General Counsel that they were with Stull most of the night in question, that they did not see Stull throw any rocks and they did not know who, if anyone, did. Because Kohus appeared more credible, and the fact that he, not Stull, was corroborated on the essential point, I find that Kohus did, at that time, accuse Stull of being the person who, in fact, had thrown rocks at the windows. Such would be the only logical explanation for Stull and Kohus getting into a curse fight as Stull testified. To the extent Stull sought to convey the impression that Kohus was indicating that he would testify falsely about what he had observed, I discredit Stull. I further discredit Hafley, Lester, Vance, and Stull and find that Stull did throw rocks at the plant windows as observed by Kohus and reported by Westerfelt and Rajewski. I note in deciding that while Stull quibbled with the term "floppy" as a description for his hat, he did acknowledge that no other striker had a full beard and no other wore a hat, although one did wear a cap.

Albeit the correct version of what occurred that night lies somewhere between the extremes and no one witness can be fully credited, I am convinced that windows were broken that night, by rocks thrown by a striker who was observed by plant security, and Stull is the culpable party.

B. *Conduct Attributed to Beaumont*

1. The "club" incident

The first alleged act of misconduct by Beaumont was her carrying a "club" on May 23 when she was across the street from the plant's main gate with Hafley, Stull, Faulkner, and Marden.

Superintendent James testified that on May 23, at 8:15 a.m., he observed Hafley, Marden, and Stull with chains in their hands while Faulkner and Beaumont carried clubs. Beaumont's club was 18 to 24 inches in length and was big around as a hammer handle. (In addition, James' contemporaneous note was received in evidence.) James observed the group for 40 minutes that morning and Beaumont held the club the entire time. James stated that the club could have been half a pool cue. James acknowledged that the production employees start at 7 a.m. and he and other management people start work at 8 a.m.

Beaumont denied having been at the picket line on May 23 before 3:10 p.m. Her usual hours of picketing were 3 p.m. until 7 a.m. the next day. Union records indicated that she was not paid for picketing between 7 a.m. and 3 p.m. on May 23.

Beaumont admitted that on one occasion, during the strike, she did have the larger half of a screw-apart pool cue in her possession. She testified that she took the cue from Faulkner, telling him it would only get him in trouble, and walked with it one-half block and put it in Faulkner's car. Beaumont was the picket captain for her shift of picketing.

I do not credit Beaumont's denial of her presence on the picket line on May 23 at 8:15 a.m. The bulk of her testimony only established that she was not actually on duty at the time James saw her, but did not rule out the possibility of her staying over as is the common practice with some pickets. It would be even more common for a picket captain to stay over shift. Beaumont's testimony of Faulkner's pool cue incident was too general and vague to be probative, and Faulkner was not called to testify. James' testimony was convincing and objectively supported without James' actual identification of Beaumont being placed in issue. I credit James over Beaumont on the club incident and find that Beaumont was on the picket line on May 23, at 8:15 a.m., for approximately 40 minutes with the larger half of a pool cue in her hand.

2. The "following" incident

The second act of strike misconduct attributed to Beaumont by Respondent is the alleged following on June 5 from the plant in her automobile of an automobile driven by Production Superintendent Carl Young.

A brief description of the road pattern around the plant is helpful: The main parking lot of the plant exits onto Victor Avenue which runs generally north and south. The gateway of the parking lot on Victor is between Adams Avenue on the north and Washington Avenue on the south. Adams and Washington run perpendicular to and terminate to the east at Victor. The first street to the west parallel to Victor is Jefferson Avenue and the next is Twightee, both of which are intersected by Adams and Washington.

Superintendents Young and James testified that it was their practice to escort, from the plant to a nearby freeway, the replacement employees whose shift ended at midnight. The automobiles would leave in file, one superintendent at the head of the line and one at the rear. The usual practice of Young and James was to return to the plant from the freeway entrance to confer with each other before going home for the night. About 2:30 a.m., on June 5, after they had escorted the employees to the freeway and returned, both left the plant in separate automobiles to go home. Young turned right out of the parking lot and took Adams to Twightee then right on Twightee for 2-1/2 blocks to Loveland-Madiera Road. Young testified that as he crossed Jefferson on Adams, he saw a black Gran Prix (Pontiac), which he knew to have then belonged to Beaumont. Young said the Gran Prix was sitting on Jefferson with its lights on. He said the Gran Prix picked him up and started tailing him. It tailed him to Twightee, then to Loveland-Madiera, then several miles down the road at speeds up to 65 miles per hour. Young turned off on a side road, and the Gran Prix "went whizzing by." He sat there a few minutes and then went home.

James testified that he left that night going left on Victor and over to Twightee then north on Twightee. As he approached the intersection of Adams and Twightee, Young turned onto Twightee going north and was followed by Beaumont in her Gran Prix. Both Young and Beaumont turned left on Loveland-Madiera, but he turned right onto Loveland-Madiera and proceeded to his home.

Beaumont does not deny it was she in her Gran Prix that night, but she denies any intent to "tail" Young. She stated that she, Betty Burton, and Vance were merely going to get hamburgers for the pickets. Beaumont stated that he did not see Young's car until she got to the corner of Adams and Twightee, and she saw him going north on Twightee coming from the Washington Avenue intersection. Young passed in front of her, and she turned right on Twightee behind him.

Vance testified that the one occasion she was with Beaumont and behind Young's car, the two of them went to Frische's Restaurant.[6]

While I credit Young's testimony that he drove the north route from the parking lot to Twightee, and not the south route which would be the implication if Beaumont were credited, I do not believe Beaumont was waiting for Young, which is the implication of Young's testimony. The testimony of Young about speeds up to 65 miles per hour is not conclusive and certainly does not establish the speed of any other vehicle, especially one behind him. There is no evidence to suggest that Frische's Restaurant is not on the route taken by Young nor is there any suggestion that the Young route was not the usual or most expeditious route away from the plant.

Based on all the evidence and the circumstances as shown in the record, I credit Beaumont's denial that she did not intend to follow Young anywhere on the night in question. I do note with particularity that Superintendent James thought nothing of Beaumont driving behind Young as far as Loveland-Madiera Road because when he got to Loveland-Madiera he turned the opposite direction and went home.

3. The "firecracker" incident

About midnight, June 8, Young led another caravan of automobiles out of the plant after shift. It is undisputed that parked at the gate used by the caravan was the automobile owned by Barbara Boyd who was in the driver's seat. With her were Beaumont, in front on the passenger side, and Marie McClendon, either in the front middle or the rear seat.

Young testified that he turned right coming out of the driveway and saw parked on the right-of-way, facing traffic, a red 1965 Chevrolet. As he made his turn, he saw a "sparkler" being ignited and saw the face of the person who had apparently ignited it—Beaumont. Then, according to Young, "I saw an arm come out the window and throw a firecracker . . . . It went off right at the back wheel as I went by." As he continued on, he heard two more firecrackers explode behind him in the

[6] Burton did not testify.

area in which the following automobiles would have been.

Beaumont denied throwing a firecracker, and McClendon and Boyd also denied that Beaumont had done such a thing.

The General Counsel argues that there is absolutely no reason for McClendon and Boyd to falsify their testimony and further that Young should be discredited because no employee in the caravan was called to testify and because Young's identification of Boyd's car was faulty. It is undisputed that Boyd's car, at the time in question, was a 1972 red Dodge Demon.

At the time they testified, Boyd and McClendon were employed by Respondent. While I fully appreciate that employees are less likely to fabricate testimony in opposition to their employer's interest,[7] I nevertheless found Young credible and accurate in his recall. Beaumont, however, made a decidedly unfavorable impression on me when testifying about the incident. While it is probable that whoever was in the second car could have testified that a firecracker was, in fact, thrown, there is no reason to believe that they would have been able to identify who had thrown it. I, therefore, draw no adverse inference from Respondent's failure to produce any other witness to the incident in addition to Young.

In summary, I find that, as Young testified, Beaumont threw one firecracker at his automobile the night of June 8.

C. *Concluding Findings*

1. Re: Stull

It is undisputed that Stull until the morning of June 16 was engaged in a course of generally protected strike activity, that Respondent knew Stull was so engaged, and that at the end of the economic strike Respondent refused to reinstate Stull because of that activity. Thus, a *prima facie* case of a discharge in violation of Section 8(a)(1) has been made out. *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21 (1964). The General Counsel does not dispute that by the proof presented herein, Respondent has gone forward with probative evidence that it held an "honest belief" that Stull engaged in misconduct of such a serious character that he lost his Section 7 protection, thereby justifying denial of reinstatement. See *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952). Where Respondent successfully presents evidence of such good-faith belief, the *prima facie* case is effectively rebutted, and the case will be dismissed unless the General Counsel then proves either the employee did not engage in the misconduct attributed to him or, in the alternative, that the conduct was not sufficiently grave as to warrant discharge or denial of reinstatement.

The General Counsel has failed to prove by credible testimony that Stull did not throw the rocks (or objects) at the warehouse windows. Therefore, the question becomes whether the "surrounding circumstances" compel the conclusion that Stull's conduct was of sufficient severity to remove from him the Act's protection. See *Alcan Cable West, a Division of Alcan Aluminum Corporation*, 214 NLRB 236 (1974), wherein the Board states:

> In determining whether a striker has, through his misconduct, forfeited his rights to preferential recall, the Board has, at all times, considered whether the alleged misconduct is of such gravity as to require, in the public interest, removal of the protective mantle which the Act affords striking employees. Not every impropriety committed in the course of events does, in fact, deprive the employee of that mantle. Our inquiry necessarily considers all surrounding circumstances to include analysis of the severity and frequency of the misconduct of the employee involved and the quality of the evidence tending to establish that misconduct.

Although windows in the plant had been broken before June 16 and required replacement anyway, there was some property damage caused by Stull.[8] Standing alone, the throwing of rocks may not disqualify Stull from reinstatement. The Board, in *MP Industries, Inc. and its Subsidiaries, Micro Alloy of Missouri, Inc. and Midwest Precision Castings Company*, 227 NLRB 1709 (1977), as correctly noted by the General Counsel, held an isolated act of egg throwing, which resulted in no property damage and injured no one, would not disqualify the involved employee from reinstatement.

The harder question is whether the conduct was rendered disqualifying because it imperiled any person. Respondent cites many cases in which the rock thrower knew, or had reason to know, that his activity would have imperiled persons who could have been hit by the rocks (or bricks) or could have been involved in an automobile accident as a result of the missile activity.[9]

The *Bromine* case is the closest in point. Rocks were thrown through a restroom window and such conduct was held to justify discharge. Although the rock throwing was found to be a wanton act because a supervisor was inspecting the glass breakage when another rock was thrown, the initial inquiry was the foreseeability that any rock thrown through the window could have injured an occupant. Thus, a question arises in this case: Was it foreseeable that Stull's conduct could have injured any person?

According to the record, there was no third-shift production and maintenance employees or supervisors. There were, however, 24-hour sentries just as there were 24-hour pickets. Was it foreseeable that a guard could have been injured? In my view it was. The windows were obviously broken to get the guards' attention or draw them to the particular area. Guards would be expected to patrol plant premises, inside and out. Any

[7] *Georgia Rug Mill*, 131 NLRB 1304, 1305 at fn. 2 (1961).

[8] The parties stipulated that at the end of the strike the cost of replacing all broken glass in the plant was $1,084. What portion could be attributed to Stull is unknown.

[9] *Gold Kist, Inc.*, 245 NLRB 1095 (1979); *Giddings & Lewis, Inc.*, 240 NLRB 441 (1979); *Carlton, An Indian Head Company, Division of Indian Head, Inc.*, 239 NLRB 495 (1978); *Bryan Infants Wear Company*, 235 NLRB 1305 (1978); *Meilman Food Industries, Inc.*, 234 NLRB 698 (1978); *Bromine Division, Drug Research Inc.*, 233 NLRB 253 (1977); *Ohio Power Company*, 216 NLRB 348 (1975); *Alkahn Silk Label Company*, 193 NLRB 167 (1971).

guard, on a routine round, could have been injured. Finally, as in *Bromine* and the instant case, once the breaking of glass is heard, it is not an unnatural reaction for those inside the building to go to the area under assault. The high windows could increase the likelihood of injury during inspection because one must look up, exposing the eyes to whatever is falling. I do not think the trajectory or the velocity of the missile must be measurable such as a bullet. Cf. *Ohio Power Co., supra*, where a rock was propelled into an occupied building by using a 12-inch metal slingshot. I am not prepared to find that the projectile must be deadly, or readily identifiable as harmful. Such a finding places the burden on the among individual. I do not think the guards on patrol (or any person engaged in security of the property) should be required to take such a chance. One cannot gainsay that shattered glass is a hazard no more than one can gainsay that rock throwing is not a natural consequence of peaceful picketing.

It is true that no one was actually hurt by the rocks or glass. However, the foreseeable consequence of Stull's action was that actual or potential occupants of the warehouse could have been injured by the intentional act. Therefore, I conclude and find that Respondent's refusal to reinstate Stull did not violate the Act, even though only slight property damage occurred to Respondent's building.

In the last analysis, the statutory protection for employees striking and picketing is couched in terms of peaceful endeavors. In my view, Stull overstepped to the violent.

2. Re: Beaumont

Albeit Beaumont was not discharged, the controlling considerations are the same. As stated in *MP Industries, supra*:

> Less severe discipline nonetheless affects an employee's employment tenure and has the same prohibited effect of interfering with and jeopardizing an employee's protected right to strike and picket.

In other words, the statutory protection is, or is not, removed because of the employee's conduct, and the extent of any discipline actually imposed is irrelevant.

I have found that Beaumont did carry a section of a pool cue on the picket line on May 23, and that she did throw one firecracker at the automobile of Carl Young as he was leading a group of production employees from the plant on June 8. The larger half of a pool cue could be utilized to inflict a terrible beating and could, if simply wielded, intimidate others. However, no nonstriking employee or employee applicants saw the cue in Beaumont's hands; therefore, a coercive impact could not be presumed. That is, there was no one there to intimidate unless it could be argued that she intimidated other strikers. Cf. *Alkahn Silk Label, supra*, at p. 175.

While having a lighted firecracker thrown at one's automobile would undoubtedly be temporarily upsetting, it is unlikely that it would cause, directly or indirectly, an accident. This is especially true where the incident occurred not on the open highway at higher speeds, but as Young was turning slowly out of Respondent's parking lot. Notwithstanding, Young testified that he heard similar reports after he passed Beaumont. There is no evidence that she threw more than the one firecracker. The record is likewise silent on any firecrackers at any other time.[10] Therefore, while the throwing of one firecracker was indeed mischievous, it can hardly be said that it (alone or taken together with the pool cue incident, which occurred 2 weeks before) was sufficient misconduct to have removed from Beaumont the statutory protection.

Since no other disqualifying misconduct by Beaumont has been proven by Respondent, I conclude and find that Respondent's suspension of Beaumont for a period of 6 weeks violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent's action of refusing to reinstate James A. Stull because of his misconduct on the picket line did not violate Section 8(a)(1) of the Act.

2. By refusing to reinstate Letitia Beaumont upon her unconditional application to return to work and suspending her for a period of 6 weeks, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.[11]

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having suspended Letitia Beaumont for engaging in protected concerted activities, I find it necessary to order it to pay her backpay for the period of her unlawful suspension with her pay computed on a quarterly basis and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),[12] from August 1, 1979, the date of her suspension, to the date she was reinstated following the suspension.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[10] The witness did suggest a hippie house in the vicinity was doing some shooting of guns, but neither the noise nor the activity appears related to the strikers.

[11] It is unnecessary to decide whether Respondent's conduct also violated Sec. 8(a)(3) of the Act inasmuch as the remedy necessary to effectuate the policies of the Act would be identical in either case. *Universal City Studios, Inc.*, 253 NLRB 1013 (1981).

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[13]

The Respondent, Totes Incorporated, Loveland, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities guaranteed by Section 7 of the Act, by refusal to reinstate them until after a disciplinary suspension period of time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Letitia Beaumont whole for any loss of pay suffered by reason of her disciplinary suspension in the manner set forth in the section of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Loveland, Ohio, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found herein.

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."